

Harmanpreet Singh (Migration) [2020] AATA 3281 (23 June 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Harmanpreet Singh
CASE NUMBER:	2002337
HOME AFFAIRS REFERENCE(S):	BCC2019/3461910
MEMBER:	Vanessa Plain
DATE:	23 June 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 23 June 2020 at 5:27pm

CATCHWORDS

MIGRATION – Cancellation – Student (Temporary) (Class TU) visa – Subclass 500 visa – the applicant was no longer in a relationship with primary applicant – break down in the relationship – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5F, 116
Migration Regulations 1994 (Cth), r 1.12*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 3 February 2020 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that a circumstance which permitted the grant of the visa no longer exists. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 23 June 2020 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
4. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the grounds set out in s.116(1)(a) of the Act. If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

Ground for cancellation

The ground for cancellation considered in by the delegate was as follows:

Section 116 - Power to cancel

- (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
 - (a) *The decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists;*
 - (2) The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.
 - (3) If the Minister may cancel a visa under subsection (1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.
6. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.

7. Particulars of the ground for cancellation

8. Information before the Department appeared to indicate that the applicant was no longer in a relationship with Sarabjit Kaur. The applicant's visa was granted because the application met, among other criteria, the secondary criteria for the visa on the basis that the applicant was a member of the family unit of Sarabjit Kaur, as prescribed by paragraph (2)(a) of regulation 1.12 of the *Migration Regulations 1994* (the Regulations), which provides as follows:

- (2) *A person is a member of the family unit of another person (the family head) if the person:*
(a) *is a spouse or de facto partner of the family head; or*

To be a member of the family unit of Sarabjit Kaur as prescribed by reg 1.12(2)(a), the applicant needed to continue to be either a spouse or de-facto partner of that person as defined respectively by sections 5F and 5CB of the Act, which state (in part):

s5F 'Spouse'

- (1) *For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a married relationship if:*
(a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
(b) *they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and*
(c) *the relationship between them is genuine and continuing; and*
(d) *they:*
(i) *live together; or*
(ii) *do not live separately and apart on a permanent basis. 1...]*

s5CB 'De facto partner'

De facto partners

- (1) *For the purposes of this Act, a person is the de facto partner of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.*

De facto relationship

- (2) *For the purposes of subsection (1), a person is in a de facto relationship with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:*
- (a) *they have a mutual commitment to a shared life to the exclusion of all others;*
and
 - (b) *the relationship between them is genuine and continuing; and*
 - (c) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis;*
and
 - (e) *they are not related by family (see subsection (4)).*
- 1...]*

9. The applicant was granted the secondary visa on the basis that he was a member of the family unit of the primary visa holder as he was in a genuine and continuing relationship with Sarabjit Kaur. Information before the delegate indicated that the applicant had ceased to be either a spouse or a de-facto partner of that person. It therefore appeared that the applicant ceased to be a member of their family unit as prescribed by reg 1.12(2)(a).
10. Based on this information, there appeared to be grounds for cancelling the applicant's visa under s 116 (1)(a) of the Act because it appeared that a circumstance which permitted the grant of the visa no longer existed.
11. On 17 December 2019 the applicant was sent a Notice of Intention to Consider Cancellation of visa. He responded in writing on 14 January 2020. He admitted that there are grounds for cancellation and provided the following reasons, as summarised by the Delegate:
 - The applicant acknowledges that there has been a break down in the relationship with his wife due to his drug addiction and mental health issues.
 - The applicant stated that he has completed rehabilitation and is hopeful to reconcile his relationship with his wife.
 - The applicant and his wife have not been living together since February 2019 when he departed for India for medical reasons.
 - The applicant requested three months to reconcile with his wife.
12. At the hearing, the applicant acknowledged that he is separated from his wife, that they have not lived together since February 2019 and that they have not reconciled.
13. On the basis of the above evidence, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

14. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
15. The applicant provided extensive reasons for why his visa should not be cancelled, as summarised by the Delegate, as follows:
 - The visa holder came to Australia on 22 January 2014 to study a Business IT degree course and used to reside with his cousin at that time.
 - The visa holder knew Sarabjit Kaur from school days and decided to get married so that he could have support in Australia.
 - The visa holder and Sarabjit Kaur got married on 18 January 2016. Sarabjit Kaur arrived in Australia in December 2016.
 - Sarabjit Kaur commenced studying towards her Aged Care Diploma.
 - Sarabjit Kaur began working and the visa holder started the Job Ready Program (JRP) with Franks Restaurant in order to obtain Australian permanent residency.
 - The visa holder got into bad company, starting smoking weed and got addicted. Thereafter, even with his wife's support, the visa holder could not overcome the addiction and became depressed. The visa holder's father took him to India for treatment. The visa holder transferred the house lease in the name of Sarabjit Kaur before departing for India in February 2019.
 - The visa holder was admitted to hospital and received treatment for three months. The visa stated that he is now cured but is still under medication. The visa holder was contacted by a representative from JRP regarding his final assessment. The visa holder passed his assessment and was scheduled for an English test on 16 January 2020.
 - There was a strong possibility of a reconciliation between the visa holder and Sarabjit Kaur since the issues that caused the disputes were no longer there. The visa holder requested that his visa be not cancelled and to be granted three months for reconciling with his wife.
 - The future of the relationship between the visa holder and his wife rests upon the visa holder receiving a favourable outcome in terms of the visa cancellation assessment.
 - The visa holder stated that the cancellation decision will have an impact on the future of him and his wife since they were about to apply for Australian permanent residence.
16. Purpose of applicant's travel to and stay in Australia
17. The applicant was granted a Student (TU 500) visa as a dependent (spouse) for the purpose of being able to accompany and remain in Australia temporarily with the primary visa holder Sarabjit Kaur with whom he was married.

18. The Department was notified that the visa holder ceased to be the spouse of Sarabjit Kaur, which the applicant admitted in his evidence. However, in his response as set out above, the applicant requested that the Department grant him three months so that he may attempt to reconcile with his wife and apply for Australian permanent residence.
19. At the hearing, although the applicant did not give evidence about his intention to seek permanent residency, he informed the Tribunal that he is no longer with his wife and that he has not had a chance to seek advice from a lawyer or agent as to what his visa options are.
20. As the applicant has ceased to be the spouse of the primary visa holder, the Tribunal considers that the purpose for which the visa was granted has ended and there is no legitimate immigration reason for the applicant to continue to hold the dependant student visa.
21. The Tribunal affords this consideration weight in favour of cancelling the visa.
22. The extent of compliance with visa conditions
23. There is no evidence before the Tribunal to suggest that the applicant has breached any of his visa conditions. The Tribunal gives this consideration a little weight against cancelling the applicant's visa.
24. The degree of hardship that may be caused to the visa holder and any family members
25. In response to the NOICC, the applicant requested the Department consider not cancelling his visa as he would like to attempt to reconcile with his wife and apply for Australian permanent residency. The applicant did not press the matter of permanent residency at hearing, but acknowledged that the attempt to reconcile with his wife had been unsuccessful.
26. The Tribunal however acknowledges that some hardship will be caused to the applicant if his visa is cancelled, because he may not be able to apply for a permanent visa or other visas.
27. The applicant also said he has been caused hardship by a loss of working rights presently and that an agent told him he may have to apply for a visa offshore, and he is worried about travelling back to India and risking his health in light of the COVID-19 pandemic.
28. There is no evidence that any family members in Australia will be adversely affected by the cancellation of the applicant's visa. However, the Tribunal acknowledge that the applicant will suffer some hardship gives this consideration some weight against cancelling the visa.
29. The circumstances in which the ground for cancellation arose
30. The grounds for cancellation arose when the applicant ceased to be the spouse of the primary visa holder Sarabjit Kaur.
31. Although the applicant did not raise it specifically at the hearing, the Tribunal has considered the applicant's claims that he had to leave for India for three months for medical treatment for depression and his marijuana addiction.
32. The Tribunal notes the applicant's contention in his NOICC response that these matters impacted greatly upon his relationship with his wife, however, the Tribunal places weight on the applicant's claim that he is recovered, attempted to reconcile with his wife this year in 2020 and was unsuccessful in achieving that objective.

33. While the Tribunal acknowledges the applicant's difficulties, the Tribunal is not satisfied that there were extenuating circumstances beyond the applicant's control that led to the ground for cancellation arising.
34. The Tribunal affords this consideration significant weight in favour of cancelling the visa holder's
35. The visa holder's past and present behaviour towards the Department
36. The applicant responded promptly to the NOICC and there is no evidence before the Tribunal to suggest that the applicant has been uncooperative with the Department or departmental staff.
37. The Tribunal gives this consideration a little weight against cancelling the visa.
38. Whether there are any persons in Australia whose visas would, or may, be cancelled under s140
39. The circumstances of this case are not such that any person's visa would be consequentially cancelled under s140 of the Act. The Tribunal therefore does not give this factor any weight for or against a decision to cancel the visa for this consideration.
40. Legal consequences of a decision to cancel the visa
41. If the visa is cancelled, the applicant will become an unlawful non-citizen and may be liable for detention under section 189 and removal under section 198 of the Act if she does not voluntarily depart Australia. The applicant would also be affected by section 48 of the Act, which may prevent her from applying for certain visas while in Australia, and Public Interest Criterion 4013, which may exclude her from being granted a visa for a specific period of time in the future.
42. However, these are mandatory and intended consequences of the legislation and given that the circumstances giving rise to the breach were not due to extenuating circumstances beyond the control of the applicant, the Tribunal does not consider this to be manifestly unfair and the Tribunal therefore gives this consideration little weight against cancelling the visa.
43. Australia's international obligations
44. There is no evidence before the Tribunal to indicate the applicant has children in Australia, nor whether cancelling the visa would lead to a breach of Australia's non-refoulement obligations. As there is no information before the Tribunal, the Tribunal does not give any weight for or against cancelling the visa for this consideration.
45. Any other relevant matters
46. The Tribunal acknowledges the applicant's claim that he is frightened to return to India in the current COVID-19 climate, however, the Tribunal does not consider this to be a significantly material matter to be attributed weight in favor of not cancelling the visa, when considered against the other matters set out above.
47. Although the matters set out above do not reveal any bad faith on the part of the applicant, it is clear based on all the evidence set out above, that the reasons for the breach of the visa condition were not matters that were outside the control of the applicant or due to extenuating circumstances.

48. It is also clear that the considerations I have arrived at, on examining and weighing all the evidence before me, lean towards the visa being cancelled and I so find.
- Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled.

DECISION

49. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Vanessa Plain
Member